

## DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

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MAR 31 1975

FILE:

B-183218

DATE:

MATTER OF:

Norman M. Russell - Request for retroactive  
promotion and salary differential

## DIGEST:

The claim of a civilian employee for retroactive promotion and salary differential between grades GS-14 and GS-15 levels may not be allowed on the basis that his duties and responsibilities were similar to those performed by individuals who were classified at grade GS-15 level, or that the position had originally been advertised at grade GS-15 level, or that the funding of the position was at grade GS-15 level, since the record shows that the claimant was officially appointed to a grade GS-14 position and the position was not reclassified during the period of his claim.

The Defense Supply Agency (DSA) requests an advance decision whether Mr. Norman M. Russell, a DSA Comptroller, may be considered to be promoted retroactively from grade GS-14 to GS-15 and awarded backpay for the period May 20, 1968, to October 21, 1973, since he was performing the duties of a position advertised at the GS-15 level during this period.

The record indicates that from May of 1963 to May 20, 1968, Mr. Russell was a Deputy Comptroller at the Richmond, Virginia, Defense General Supply Center (DGSC), a field activity of the DSA. He was classified at the grade GS-14 level while he was Deputy Comptroller. On May 20, 1968, the position of Comptroller of the Defense Supply Center was converted from a position requiring military staffing to one requiring filling by a civilian, and Mr. Russell was appointed Acting Comptroller by Brigadier General John D. Hines. At this time Mr. Russell retained his GS-14 grade level. By notification of personnel action, standard form 50, Mr. Russell was reassigned effective February 9, 1969, from Deputy Comptroller, GS-501, to Financial Manager, GS-505, at the grade GS-14 level. Mr. Russell remained in this position at the grade GS-14 level until October 21, 1973, at which time he was promoted to Financial Manager, GS-505, at grade GS-15 level.

Mr. Russell argues that his position for the period from May 20, 1968, to October 21, 1973, should be retroactively adjusted to the

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grade GS-15 level, and he requests the salary differential between grades GS-14 and GS-15 for this period. Mr. Russell bases his claim on several theories. He states that his counterparts in other Defense Supply Agency Centers were classified at grade GS-15 levels; that his duties and responsibilities after October 20, 1973, were virtually identical to those between May 20, 1968, and October 20, 1973; that the position which he held at the grade GS-14 level was authorized and funded by the DSA Headquarters at a grade GS-15 level; that the position which he occupied at the grade GS-14 level was initially advertised at a grade GS-15 level; that a man who was a Civilian Personnel Officer while Mr. Russell was classified at the grade GS-14 level thought the claimant's position should have been graded at a GS-15 level; and that Mr. Russell performed his duties adequately. In addition, Mr. Russell feels that his case is similar to the situation in a previous Comptroller General decision, 53 Comp. Gen. 216 (1973), in which a claimant was granted a retroactive promotion with backpay.

The general rule in cases of this nature is that an employee of the Government is entitled only to the salary of the position to which he is actually appointed, regardless of the duties he performs. When an employee performs duties normally performed by one in a grade level higher than the one he holds, he is not entitled to the salary of the higher level until such time as he is promoted to the higher level. See United States v. McLean, 95 U.S. 730 (1877); Moray v. United States, 35 Ct. Cl. 603 (1900); Barrett v. United States, 37 Ct. Cl. 44 (1901); Jackson v. United States, 42 Ct. Cl. 39 (1906); Dianish et al. v. United States, 183 Ct. Cl. 702 (1968); 52 Comp. Gen. 631 (1973); B-179207, November 21, 1973. In Coleman v. United States, 100 Ct. Cl. 41 (1943), a claimant sued to recover money allegedly owed him because he had been required to perform duties at a grade level higher than the one he held. The Court of Claims stated:

"There are innumerable instances in the Government service where employees of a lower classification perform the duties of a higher classification \* \* \* The salaries fixed by Congress are the salaries payable to those who hold the office and not to those who perform the duties of the office. One may hold the office only by appointment by his superior, and the law vests in the superior the discretion as to whether or not appointment to the office shall be made. Where the plaintiff has received the salary of the office to which

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he is appointed he has received all to which he is entitled under the law. \* \* \* (Emphasis supplied.)

The courts have consistently held that a person's right to salary is determined by the position which he holds rather than the duties he performs.

As a general rule, an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. When an employee performs duties entitling him to be compensated at a grade higher than the one in which his position is currently classified and is able to obtain reclassification and promotion, he is not entitled to compensation at the higher grade level for work performed prior to the time that his promotion becomes effective. See 26 Comp. Gen. 706 (1947); 39 Comp. Gen. 583 (1960); 40 Comp. Gen. 207 (1960); 52 Comp. Gen. 651 (1973); 52 Comp. Gen. 920 (1973).

The establishment of positions for Federal employees, the grading of such positions, and the appointment of employees to the positions are matters of administrative discretion which rest with the Civil Service Commission and the administrative agency involved in individual cases. See Tierney v. United States, 168 Ct. Cl. 77 (1964); Montstrom v. United States, 177 Ct. Cl. 818 (1966). Federal employees have no vested right to be promoted to higher grades at specific times. B-173815, November 6, 1972.

There are some exceptions to the general rule that administrative changes in salary will not be made retroactively. We have permitted retroactive promotions with resulting salary adjustments where employees were adversely affected by the failure of an agency to carry out or comply with nondiscretionary requirements found in law, administrative regulations, executive orders, or a collective bargaining agreement. See 54 Comp. Gen. 403 (B-181069), November 20, 1974; 54 Comp. Gen. 512, October 31, 1974 (B-180010); 54 Id., December 2, 1974 (B-180010). In each of these cases, the agency's actions were found to constitute an unjustified or unwarranted personnel action and retroactive correction of such actions was authorized under the Back Pay Act, 5 U.S.C. 5596 (1970).

Mr. Brasell argues that our holding in 53 Comp. Gen. 216 (1973) supports his contention that he is entitled to backpay. In that case an employee made a claim for retroactive promotion and salary

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differential between grades GS-12 and GS-13. The claimant there argued successfully that the position in which he had been serving as a grade GS-12 was reclassified to a grade GS-13 level by the administrative office and although he was legally qualified for the promotion, the administrative office failed to promote him in a timely fashion. We pointed out that when a position has been reclassified to a higher grade, Civil Service Commission regulations require that an agency must, within a reasonable time, either promote the incumbent, if qualified, or remove him. We stated that:

"It is well established that, when an agency reclassifies a position to a higher grade, it must, within a reasonable time after the date of final position classification, either promote the incumbent if he is otherwise qualified or remove him. See B-165307, November 4, 1968; 48 Comp. Gen. 258 (1968); 37 Comp. Gen. 492 (1958). This is to be distinguished from the situation where an employee is detailed to a higher-grade position. In the latter situation, the employee is entitled to the compensation only of the grade to which he has been officially appointed. Where, on the other hand, as in the instant case, an agency upgrades a position, the retention of the incumbent in that position amounts to a determination by the agency that the incumbent is in fact qualified to perform the duty of the higher grade. \* \* \*" (Emphasis added.)

Thus, the agency's failure to either promote the employee or remove him was unjustified.

Mr. Russell's situation is entirely different. During the entire period in question, it was administratively determined to maintain his position at grade GS-14, and there is no evidence that the Civil Service Commission had ordered a higher classification with which the agency failed to comply. The fact that Mr. Russell, between May 20, 1968, and October 20, 1973, may have performed the same duties for which other individuals at other commands were being paid at a grade GS-15 level does not, per se, make his administrative office's decision to hold him to the grade GS-14 level improper.

On the record before us we find no evidence that Mr. Russell has suffered an unjustified or unwarranted personnel action within the

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meaning of the Back Pay Act, 5 U.S.C. 5396, nor are we aware of any other statute which would authorize a retroactive promotion in his situation. Accordingly, because Mr. Russell was officially classified in a grade GS-14 position during the period in question, he received all the salary to which he was entitled, and his claim may not be paid.

R.F. KELLER

[Deputy]

Comptroller General  
of the United States